Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-1072

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

Joe Linden Blanton

v.

United States of America

Petition for Rehearing on Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Tenth Circuit

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Pursuant to U. S. Supreme Court Rule 58, 28 U.S.C.A., Petitioner requests that a stay order be issued having fully exhausted every rule afforded by the lower Court wherein mandate will issue on the 17th day of May, 1976. Said Petitioner will be incarcerated unless this Court stays said mandate jurisdiction.

Jurisdiction

The judgment of the Court was entered and a mandate issued on the 17th day of May, 1976, and the jurisdiction of this Court is invoked under Rule 58 of the U.S. Supreme Court, 28 U.S.C.A.

Questions Presented

As stated by the Solicitor General in said brief where the general rule is a conspiracy and the substantive offense which is its object are separate offenses, requiring proof of different facts.

Reason for Granting the Rehearing

Ambiguity of the Information

The Court of Appeals for the Tenth Circuit recognized the ambiguity contained in the Information, however, they dismissed the Plaintiff's contention stating that the error is not fatal (see Appendix A, Page 3 of Petition for a Writ of Certiorari). This decision conflicts with the Sixth Amendment of the Constitution pertaining to the right of the accused " . . . to be informed of the nature and cause of the accusation. . . " The Tenth Circuit decision also conflicts with Rule 7(c) of the Federal Rules of Criminal Procedure.

The ambiguity in the Information is more than just an erroneous code reference. The compositions registered in Class E which have been reproduced mechanically on interchangeable parts. It further uses the language

> ". . .and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement. . . ."

Whereas, the provisions of 17 U.S.C. § 1(f) is

direct to the protection of sound recordings and prevents the unlawful reproduction and distribution to the public. The language used is

"To reproduce and distribute to the public".

The general rule being that "penal statutes must be strictly construed against the prosecution or be strictly construed against the person accused, "U.S. v. Wells, D.C. Tex 1959, 176 F. Supp. 630, when applied to the two code sections 101(e) and 1(f) changes the elements of the crime, the burden of proof of the government and the burden of the defense.

The District Court replied to the Petitioner's contention of the ambiguity of the charges in the pretrial order of May 7, 1974 (see Appendix B, Page 11, of Petition for a Writ of Certiorari). The Court stated "the crime of 'record piracy' in violation of 17 U.S.C. sections 101(e) and 104 consists of four essential elements:

(1) a copyrighted sound recording is manufactured,

used or sold. . ." This judicial determination furthered the ambiguity of the Information through the trial and was not amended until instructions were given to the jury. The government was given the easier burden in proving "a sound recording is manufactured, used or sold" rather than the correct burden of proof as set out in section 1(f) that being to prove both reproduction and distribution.

The Supreme Court has set forth the test to be used in determining whether or not an indictment or information is sufficient. The Court, in presenting the test, stated:

> "The test of sufficiency of indictment is whether it contains elements of offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and whether the record shows accurately to what extent he may plead a former acquittal or conviction in any future proceedings against him for a similar offense." United States v. Debrow, Supra. at 376. See also Cochran and Sayre v. United States, 157 U.S. 286.

Appellant's Sixth Amendment right was violated and the test as set forth in United States v. Debrow was not met as appellant could not adequately prepare a defense to the charge since he was not fully apprised of the charge because of the vagueness of the Information. Even though the lower Court did not do so, after repeated requests by appellant's counsel to so clarify, until just prior to presentation of final argument. The entire trial process had virtually been completed before the Information was clarified thus appellant was not given the opportunity to conduct his defense adequately during the process of the trial.

In 1941 the Court stated that:

> "The purpose of the requirement that an indictment be sufficient to apprise the accused with a reasonable certainty to the nature of the accusation against him ' is to insure that the accused will be able to properly prepare and make his defense and thereafter be able to plead the judgment as a bar to a subsequent prosecution for the same offense and

> also inform the Court of the facts alleged so that it may properly decide the case and pronounce judgment.'" United States v. Henderson, 121 F. 2d 75, 78 (D.D.C.1941)

In order for appellant to have prepared his defense the Information should have been clarified prior to trial or during the early stages of trial. But when the Information is not clarified until near the end of the trial at a point just prior to final argument there is no opportunity for appellant to prepare his defense so appellant is not truly aware of the real charges against him. Even if the Information is in the language of the statute, by which a person is charged, it is still "insufficient for the Information to charge simply in the language of the statute, if the statute itself fails to set forth expressly, fully, and clearly all elements necessary to constitute the offense." Huges v. United States, 340 F.2d 609, 610 (First Circuit 1965).

In the case of United States v. Donovan, 339

F. 2d 404 (Seventh Cir. 1965) the appellant contended that the indictment was violative of appellant's Sixth Amendment right, as it failed to apprise the appellant of the nature and cause of the accusation against him. id at 407. The Court held, as to this indictment, that:

> "It is an elementary principle of criminal pleading that where the definition of an offense employs generic terms it is not sufficient to charge the offense in such generic terms but the indictment must state the specifice - it must descend to particulars." id at 407. See also Russell v. United States, 369 U.S. 749.

The Court in Donovan further stated:

> "The basis upon which this principle rests - the necessity that the indictment inform the accused with reasonable certainty of the specific offense with which he is charged - is, in our opinion, equally applicable where the statute, as it does here, prescribes different types of conduct in the disjunctive." id at 407 (Emphasis added).

The Petitioner urges this Court to review the decision of the Tenth Circuit in view of the Debrow case and the apparent conflicting decision of the

Sixth Circuit and the First Circuit regarding the ambiguity contained in the Information. The Petitioner also urges this Court to review the judicial proceedings of the trial court in allowing the government to amend the Information after arguments of counsel and prior to the instructions to the jury.

The acquittal of the conspiracy charges clearly supports that the conviction under Section 101 (e) wherein the Petitioner was accused of infringement of the sound recording rights and of manufacturing same did not lie. The Government under said rule would have to prove the unauthorized manufacture, sale or use of all three elements. To sustain a conviction and to allow the Government to amend information after final argument totally disregards all constitutional provisions herein required by Fed. R. Crim. P. 7(c)(1), which permits amendments which is subject for review of

this Court. The essence of this review is that wherein Defendant was acquitted of the conspiracy count, the aforesaid counts prevent any substantive conviction for reason that the same would be double jeopardy wherein the substantive offenses are the objective of requiring proof of different facts.

Conclusion

This case is unique in that this is a recently enacted statute barring the manufacture of copyrighted tape, which is commonly known as priate tape sales. This is a quasi criminal statute carying up to six months imprisonment and $1,000.00 fine for each charge.

This case is the first case wherein the Defendant was convicted and jailed. The acquittal of the conspiracy is res judicata upon every substantive and every issue charged, which is analog ous in United States v. Oppenheimer, 242 U.S. 87,

as noted in United States v. Calvin, 272 F. 985, wherein Justice Douglas speaking for the Court states:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separage and distinct offenses. Pinkerton v. United States, 328 U.S. 640, 643. Thus, with some exceptions, one may be prosecuted for both crimes. Ibid. But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings. (United States v. Oppenheimer, 242 U.S. 85, 87; United States v. De Angelo, 138 F. 2d 446,468: 147 A.L.R. 991; see Frank v. Mangum, 237 U.S. 309, 334) and operates to conclude those matters in issue which the verdict determined through the offenses be different. See United States v. Adams, 281 U.S. 202, 205.
>
> Thus, the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." Sealfon v. U.S., 332 U.S. 575 (1948), (See also U.S. v. Flowers,

255 F. Supp. 485 (1966) and State v. Cormier, 218 A. 2d 138 (1960)).

The issue of double jeopardy is squarely before the Court in view of United States v. Cole. Petitioner submits that it is of constitutional importance because all efforts have been exhausted and the Petitioner will be incarcerated May 17, 1976, unless this Court issues an Order of Stay and grants certiorari to determine the constitutional issues which are of paramount importance which is basic to the constitutional rights of the Petitioner. For the above reasons the Petitioner submits that a Writ of Certiorari should be issued by this Court.

Respectfully submitted,

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Certificate of Counsel

I, Bruce H. Harlton, Jr., certify that I am the Attorney of Record for the Petitioner, Joe Linden Blanton, and that this Petition for Rehearing is presented in good faith and not for pruposes of delay of this Court or execution of sentence.

Bruce H. Harlton, Jr.